

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

1 <sup>ST</sup> NATIONAL RESTORATION	:	APPEAL NOS. C-080115
CONTRACTORS, INC.,		C-080232
	:	TRIAL NO. A-0508036
Plaintiff-Appellee,		
vs.	:	<i>JUDGMENT ENTRY.</i>
BRUCE CUTLER,	:	
Defendant,	:	
and	:	
UNION SAVINGS BANK,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant, Union Savings Bank (“USB”), appeals a judgment in favor of plaintiff-appellee, 1<sup>st</sup> National Restoration Contractors, Inc., for statutory conversion and negligence, as well as an award of prejudgment interest. We find no merit in USB’s three assignments of error, and we affirm the trial court’s judgment.

The record shows that 1<sup>st</sup> National’s primary business was restoring and repairing residential property following fire, hail, or wind damage. Often homeowners would deliver or endorse over to 1<sup>st</sup> National a check from their insurance company to pay for 1<sup>st</sup> National’s services.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Defendant Bruce Cutler was an independent contractor who worked with 1<sup>st</sup> National. His primary responsibility was to acquire jobs and work with insurance adjusters on 1<sup>st</sup> National's projects. Cutler had authority to obtain checks from homeowners or their insurers and to deliver the checks to First National's office. Cutler had no authority to sign or endorse checks on 1<sup>st</sup> National's behalf.

Cutler opened an account at USB in the name of B.S. Cutler Corporation. When opening the account, he presented a driver's license. USB did not require any other identification to open this business account. At that time, showing a driver's license to open an account was USB's standard business practice. Cutler later changed the name of the account to B.S. Cutler Corporation, dba 1<sup>st</sup> National Restoration Contractors, and USB did not ask for any documentation to support the name change.

1<sup>st</sup> National entered into contracts with several homeowners to provide repair services to their residential properties. Cutler was 1<sup>st</sup> National's agent for those projects. Upon completion of the projects, Cutler received checks from the homeowner or the homeowner's insurer intended for payment to 1<sup>st</sup> National.

Cutler deposited these checks into his USB account. The bank honored all the checks, although none of them was made out to Cutler and many of them were made out to 1<sup>st</sup> National. One of USB's witnesses testified that USB would not necessarily have required the name on the check to match the name on the account.

Further, USB had a policy of limiting cash disbursements to customers to \$2,000 per day. But it regularly allowed Cutler to deposit checks and receive cash in excess of \$2,000.

Eventually, Cutler confessed his actions to one of the owners of 1<sup>st</sup> National. 1<sup>st</sup> National filed a complaint with the police and met with USB personnel. USB made no effort at all to attempt to resolve the situation. It would not give 1<sup>st</sup> National copies of the checks and basically told the owner that he would have to file a lawsuit.

After hearing the evidence, a magistrate found that USB had failed to exercise ordinary care in depositing checks payable to 1<sup>st</sup> National in Cutler's account and dispersing funds from that account to Cutler before the checks were presented to the drawee bank. The magistrate also found that USB had deposited checks payable to 1<sup>st</sup> National from various homeowners into Cutler's account and dispersed funds from that account in violation of R.C. 1303.60.

The trial court overruled USB's objections to the magistrate's report and awarded judgment to 1<sup>st</sup> National for \$23,603.93 plus interest. The court also awarded 1<sup>st</sup> National prejudgment interest of \$4,378.99. This appeal followed.

In its first assignment of error, USB contends that the trial court erred in finding USB liable for statutory conversion. It argues that 1<sup>st</sup> National did not present evidence to prove all the elements of conversion. This assignment of error is not well taken.

R.C. 1303.60(A) provides that an instrument is converted if "a bank makes or receives payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." Thus, an endorsement of a check by an agent of the payee who expressly lacks authority to endorse checks is a forged endorsement, and payment on the endorsement by the bank is a conversion of the check.<sup>2</sup> R.C. 1303.60 further provides that "the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

On appeal and at trial, USB has argued that 1<sup>st</sup> National failed to prove its interest in the instruments because the copies of the checks it presented into evidence were illegible. This argument completely ignores the fact that USB produced the illegible checks in discovery, as it was obligated to do. R.C. 1109.69(A)

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<sup>2</sup> *Morrison v. First Natl. Bank*, 10<sup>th</sup> Dist. No. 01AP-555, 2002-Ohio-783; *Palmer Mfg. & Supply, Inc. v. BancOhio Natl. Bank* (1994), 93 Ohio App.3d 17, 21, 637 N.E.2d 386.

requires all banks to retain and preserve bank records, including checks, for certain periods of time.<sup>3</sup> USB should not have been allowed to benefit from its failure to maintain legible copies of the checks.

This argument also ignores that 1<sup>st</sup> National presented other evidence of its interest in the checks. 1<sup>st</sup> National's witnesses testified as to the amounts due under the contracts and the amounts of the various checks. Consequently, it established the amount of its interest in the checks.<sup>4</sup>

USB also argues that Cutler was 1<sup>st</sup> National's agent and that it could not repudiate the acts of its agent. To recover under R.C. 1303.60, 1<sup>st</sup> National had to prove that it took delivery of the disputed checks either directly or through an agent.<sup>5</sup> The trial court specifically found that Cutler was 1<sup>st</sup> National's agent, which was a question of fact.<sup>6</sup>

Nevertheless, the unrebutted evidence at trial showed that Cutler had authority to take checks from homeowners and deliver them to 1<sup>st</sup> National's office. He had no authority, express or implied, to endorse checks or deposit them into any account. Only 1<sup>st</sup> National's two owners had that authority. Since Cutler's acts were outside of his authority, 1<sup>st</sup> National was not bound by them.<sup>7</sup>

The record shows that 1<sup>st</sup> National presented evidence on all the elements of statutory conversion under R.C. 1303.60. Further, even if had not, the evidence supported the trial court's finding that USB had acted negligently. Therefore, the

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<sup>3</sup> *Spiller v. Sky Bank*, 3<sup>rd</sup> Dist. No. 8-07-03, 2008-Ohio-1338, ¶8-9, discretionary appeal allowed by 119 Ohio St.3d 1471, 2008-Ohio-4911, 894 N.E.2d 331; *Brentlinger v. Bank One of Columbus*, 150 Ohio App.3d 589, 2002-Ohio-6736, 782 N.E.2d 648, ¶33-44.

<sup>4</sup> See *Star Bank N.A. v. Provident Bank* (July 24, 1998), 1<sup>st</sup> Dist. No. C-970747.

<sup>5</sup> *Title First Agency, Inc. v. Xpress Closing Serv., Inc.*, 10<sup>th</sup> Dist. No. 03AP-179, 2004-Ohio-242, ¶18.

<sup>6</sup> See *Hale v. Volunteers of Am.*, 158 Ohio App.3d 415, 2004-Ohio-4508, 816 N.E.2d 259, ¶53; *Title First*, supra, at ¶18.

<sup>7</sup> See *Republic Waste Services of Ohio Hauling, LLC v. Pepper Pike Prop., Inc.*, 8<sup>th</sup> Dist. No. 81525, 2003-Ohio-1348, ¶18-19; *Midland Ent., Inc. v. St. Paul Fire & Marine Ins. Co.* (2000), 139 Ohio App.3d 650, 657, 745 N.E.2d 455.

trial court did not err in awarding judgment in favor of 1<sup>st</sup> National. We overrule USB's first assignment of error.

In its second assignment of error, USB contends that the trial court erred in denying its motion for leave to file a cross-claim against Cutler for fraud. The decision whether to grant leave to file an amended pleading lies within the trial court's discretion.<sup>8</sup> "Leave of court should be given when justice so requires."<sup>9</sup> A court should grant a motion for leave to amend absent a finding of bad faith, undue delay, or undue prejudice to the opposing party.<sup>10</sup>

Cutler was named as a defendant in the case from the beginning, although he could not be located and did not actually appear in the action until after the trial. 1<sup>st</sup> National asserted identical claims against USB and Cutler. In its complaint, it alleged that Cutler did not have authority to deposit checks into the account. USB could have filed a timely cross-claim against Cutler, yet it gave no indication that it intended to so. It did not attempt to assert its cross-claim until approximately two years later, after the trial to the magistrate, when the magistrate had recommended that the court enter judgment against it.

USB has not provided adequate reasons for this undue delay. Further, we believe that it would have been highly prejudicial for the court to permit it to raise its cross-claim at that late stage of the proceedings, particularly when it could still have filed an independent action against Cutler. Under the circumstances, we cannot hold that the trial court's decision to deny USB's motion for leave to file a cross-claim was so arbitrary,

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<sup>8</sup> *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 5-6, 465 N.E.2d 377, modified on other grounds by *Jim's Steakhouse, Inc. v. Cleveland*, 81 Ohio St.3d 18, 1998-Ohio-440, 668 N.E.2d 506; *Heard v. Dubose*, 1<sup>st</sup> Dist. No. C-060265, 2007-Ohio-551, ¶7.

<sup>9</sup> Civ.R. 15(A).

<sup>10</sup> *Hoover*, supra, at 6; *Heard*, supra, at ¶8.

unreasonable, or unconscionable as to connote an abuse of discretion.<sup>11</sup> We overrule USB's second assignment of error.

In its third assignment of error, USB contends that the trial court erred in granting prejudgment interest. R.C. 1343.03(C) allows the trial court to award prejudgment interest if it determines that “the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case[.]”

A party has “not failed to make a good faith effort to settle” if that party has (1) fully cooperated in discovery proceedings, (2) rationally evaluated its risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good-faith monetary offer or responded in good faith to an offer from the other party. If a party has a good-faith, objectively reasonable belief that it has no liability, it need not make a settlement offer.<sup>12</sup> The decision whether to award prejudgment interest lies within the trial court's discretion, and an appellate court will not reverse that decision absent an abuse of discretion.<sup>13</sup>

USB took a callous position from the beginning of this case. When 1<sup>st</sup> National's owner learned of Cutler's actions and complained to the bank, it made no effort to resolve the case at all. It would not give him copies of the checks and told the owner to sue. Once the case was filed, USB took the ludicrous position that 1<sup>st</sup> National could not prove its case because the checks were illegible, even though it had provided the copies of the checks. It also took the position that Cutler's absence somehow prevented 1<sup>st</sup> National from proving its case, which the record shows was not reasonable.

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<sup>11</sup> See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140; *Heard*, supra, at ¶12.

<sup>12</sup> *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 159, 495 N.E.2d 572; *Wynn v. Gilbert*, 1<sup>st</sup> Dist. No. C-060457, 2007-Ohio-2798, ¶44.

<sup>13</sup> *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse*, 74 Ohio St.3d 474, 479, 1996-Ohio-365, 659 N.E.2d 1268; *Wynn*, supra, at ¶44.

1<sup>st</sup> National, a small business that needed at least some of its money back, made numerous offers to settle, one for less than half the value of the checks. USB rejected every offer, and its only offer was to pay \$3,000. Under the circumstances, we cannot hold that the trial court's determination that USB had failed to rationally evaluate its risks and potential liability and to make a good-faith settlement offer was an abuse of discretion. Consequently, we overrule USB's third assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., HILDEBRANDT and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 31, 2008  
per order of the Court \_\_\_\_\_.  
Presiding Judge